

Listening and Matching, the Keys to Witness Examination

By Charles B. McFarland

On a recent appearance on the Late Show with David Letterman, Clint Eastwood offered a seemingly counterintuitive observation, “Acting is listening.” We tend to think of actors for the lines they deliver. The actor’s lines are delivered in a context, however, and the actor’s delivery of the line has to match the context, in tone and in content. If the delivery does not match what has come before, the presentation suffers. To make sure his or her delivery matches, the actor must listen. Thus, acting is listening.

This observation is pertinent because, in a very real sense, trial lawyers are actors. This is especially true in the examination of witnesses. There is a script to be followed, which may or may not be written. The lawyer plans and prepares his or her examination of each witness, if not the questions, then certainly the elements to be addressed. There is rehearsal, both in the preparation of witnesses and preparation for cross-examination of the other side’s witnesses. Vigorous rehearsal, which is encouraged, inevitably will lead to modifications of the script. And then there is the final production: the trial. During the trial, the lawyer and witness give their lines, just as actors deliver their lines. The lawyer’s objective is not to learn the answers to his questions; the lawyer should already know them, and the story they tell, just like the actor knows how his story ends. Instead, the lawyer wants to persuade the audience, the jury, that the questions and answers tell a story that is more credible than the other side’s.

If examining witnesses is acting, then the key to examining witnesses is listening. To maximize the persuasiveness of each witness’s testimony, the trial lawyer must listen to the answers he or she elicits and match his or her response to these answers. The same is true of witnesses: The witness must learn to listen to the lawyer’s questions and to match his or her answers to the questions asked. This is more difficult than it sounds.

A question is not an invitation for the witness to take a turn at speaking. Each question should seek to elicit specific information, and each question should be clear as to the type of information that is expected. The lawyer’s question should create an expectation in the minds of the audience—the jury—as to what the witness’s response will

be. Just as important as creating this expectation, the witness must meet this expectation. Thus, his or her answer must match the question asked; this requires careful listening.

Question: What color was the car? Answer: It was speeding down Main Street and ran the red light. In this example, the question creates an expectation in the minds of the jury: We’re talking about the identification of the car involved in the accident. One of the next four words out of the witness’s mouth should be a color. By meeting the jury’s expectation, the witness can establish and build his or her own credibility. But the witness’s answer failed to meet this expectation, which can have an adverse effect on the jury’s perception of the witness’s credibility. First, the jury was not rewarded for listening and thinking about the lawyer’s question, because the response bore little relation to it other than perhaps as a topic suggestion. In the long term, the jury will stop listening to questions if they do not relate to the answers given, and the opportunity to create and satisfy the jury’s expectations will have been lost.

Additionally, by instead injecting nonresponsive information about the case, the witness has revealed an agenda. A witness’s role is to respond to the questions asked, and he or she should not appear to have an agenda other than to tell the truth. The witness exceeds his or her role when responding to questions that have not been asked, and the jury will want to understand the witness’s motivation for doing this. A witness with an agenda is less credible because, in the jury’s mind, the witness has a motivation other than to tell the truth.

Every witness indeed has an agenda, whether this agenda is to help a particular party, to develop future business, or simply to get off the stand as quickly as possible. The jury expects the witness to have an existing connection to one side or the other. The jury, however, still expects the witness to answer questions truthfully. The witness frustrates this expectation with answers that are non-responsive or overly responsive.

Correspondingly, revealing a witness’s agenda is a critical goal of cross-examination. If a witness’s answers fail to match the question asked, an indication of the witness’s agenda should be pointed out to the jury. Instead of answering the question, the witness is taking the opportunity to



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tell the jury what he or she thinks is important. Injecting nonresponsive information is a form of argument. The jury understands that the lawyer is an advocate, and an advocate is expected to argue. Thus, the lawyer does not lose credibility by making arguments. A witness, however, is not an advocate and is not expected to argue. He or she loses credibility by arguing.

A question is not a topic suggestion. Because the other side can object to questions that call for a narrative response, some lawyers believe that narrative responses are effective. This is false logic. The lawyer objects to questions calling for narrative responses not because they are an overly effective means of presenting evidence but because these questions tend to eliminate the lawyer's ability to police the admissibility of the witness's testimony.

The narrative response, while perhaps an effective method of improperly injecting inadmissible evidence, is one of the least effective means for presenting credible evidence. Like the would-be objecting lawyer, the jury has no idea what the witness is going to say and, therefore, no expectation or anticipation. In a very real sense, the jury has lost its guide to the witness's testimony: the lawyer's questions. Also, in a narrative response, important information does not stand out from secondary or even irrelevant information included in the witness's response. Finally, the witness has also lost the opportunity to build his or her credibility by meeting the jury's expectations created by the question.

Jurors like to think, and they tend to believe things that they figure out for themselves more than things they are told. A narrative response does not give the jurors the opportunity to make their own determination of what the answer to the question should be. The effective examination of witnesses is more than simply eliciting a list of items from each witness. The list is important, but the other side has a list too. The difficult cases are determined by the credibility of the witnesses and the evidence. The examination of witnesses should be conducted in a way that maximizes the opportunities to build the witness's credibility.

To maximize the witness's credibility, the lawyer must also listen and match his or her questions to the answers given by the witness. In the above example, the witness skipped ahead to make sure the important part of the testimony was not omitted. The witness needs to trust the lawyer to ask all of the questions needed to make the witness's points. Often, a witness's answer to a particular question will require clarification or follow-up. If the witness does not trust the lawyer to do this, the temptation will be to do it himself or herself, at the potential expense of the witness's credibility.

A vivid example of this was seen in the government's trial of Enron's former CEO Kenneth Lay. Lay's lead attorney, Mike Ramsey, became ill and was unable to attend the trial during Lay's examination. Lay clearly did not trust Ramsey's stand-in, the more-than-capable George "Mac" Sechrest. Even a brief excerpt of his testimony reveals both his agenda as a witness and his lack of faith in Sechrest to ask the right questions:

Question: So when—when did you—when did you return to Houston? Answer: Well, after that—and as it turned out—I mean, we had that conversation. We decided—and there were several key decisions that needed to be made. The—as an informal inquiry—and I think that's the exact term they use—informal inquiry, you don't have to report them publicly. And indeed, about 80 percent—I'm told about 80 percent of the companies that get those inquiries don't report them publicly.

It is not clear when Lay returned to Houston. It is clear, however, that he wanted the jury to know that the inquiry Enron failed to report was an informal one and that most companies do not report informal inquiries, and he was not willing to risk his lawyer omitting this fact. Lay's credibility on direct examination became a key focus of his trial and ultimate conviction.

The lawyer needs to listen carefully to make sure the desired information is elicited from the witness. One technique that contrasts with writing down one's questions is to write down the answers sought and keep asking the questions until all of the answers are obtained. This focuses the lawyer's attention where it should be—on the answers instead of on the questions. Whether a question has been asked is a very different point from whether it has been answered. An important question should continue to be asked until it is answered. The key to making sure the questions are answered is listening.

At the end of the day, the lawyer's role is to persuade. Because the jury is the sole judge of the credibility of the evidence, the question in every jury trial is how to maximize the credibility of your evidence and diminish the credibility of the other side's evidence. In the typical civil case, you will have opportunities to establish the credibility of your witnesses and the lack of credibility of the other side's witnesses during the direct examination of your witnesses, the cross-examination of the other side's witnesses at deposition and at trial, and in preparing your witnesses for deposition and trial. Each of these areas is important to ensuring the credible presentation of evidence in your case.

Rumpole of the Bailey best expressed trial lawyers' typical sentiment towards the direct

examination of his own witnesses: “Calling your own client is the worst part of a trial. You can’t attack him, or lead him, or do anything but stand with your palms sweating and hope the old nitwit tells the right story.”¹


Nevertheless, direct examination is the most important part of the trial. While cases may be won in cross-examination, just as importantly, cases may be lost in direct examination. If your witnesses are not credible in direct testimony, then the other side has little to do in cross-examination. Moreover, the decision to go to trial is typically based on the strength of your evidence and not on the perceived frailty of the other side’s evidence. Furthermore, you would expect to establish the elements of your claim or defense through your witnesses, not the other side’s witnesses. In an effective direct examination, the witness’s answers match the lawyer’s questions, and the lawyer’s questions match the witness’s answers.

Listening and matching can also play an important role in cross-examination. There are a number of things to listen for. First, the answer has to match the question. Additionally, the lawyer needs to listen carefully for any qualification of the witness’s answer. The goal is an unequivocal answer to every question. If the question needs to be clarified to get this, clarify the question so that there is no doubt about the witness’s position at the end of the examination. The lawyer also needs to listen for phrases the witness will use that sound responsive to get out of answering a difficult question. Most effective cross-examination questions can be answered with a yes or no, and the examiner should insist on this.

The key to effective testimony by your witnesses under cross-examination is, as always, preparation. While the goals are a little bit different in a deposition than a trial, the technique is the same: The witness needs to listen to the question and match his or her answer to the question. To avoid

appearances of an agenda, the witness needs to answer the questions asked. This may come as a surprise to the witness. It should be a relief. The witness’s role is to respond to questions. He or she wants to be no more or no less responsive to the other side’s questions than he or she would be with yours. The witness needs to listen carefully to the questions, though, to make sure he or she understands what is being asked and is not led to agree to something that is not accurate.

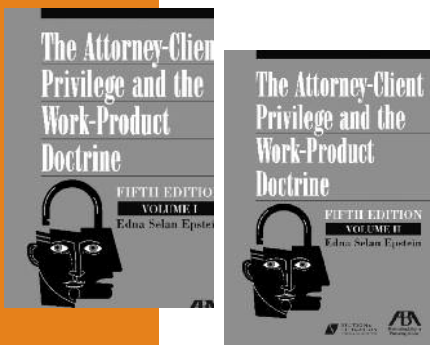
Many lawyers write down their questions, particularly for depositions. They also write down the witness’s answers to those questions or make a check beside the question when it is answered, and the lawyer then moves on. When the witness offers information outside of the question asked, however, the lawyer will write down the additional information and ask follow-up questions. In theory, this process could go on indefinitely. The witness, in attempting to short circuit additional questions by telling the lawyer everything he or she knows on the topic, provides the lawyer with an additional line of questions. In preparation, witnesses must be reminded that a question is not a topic suggestion. The witness needs to listen carefully and then merely match his or her answer to the question.

Matching is critical to the effective examination of witnesses. It is not possible without strong listening skills. Listening is a challenging mental task, and yet it is rarely taught. The brain works about four times faster than the mouth and has a tendency to move on, whether to the next question or another topic altogether, while waiting for the mouth to finish. Improving your listening skills and those of your witnesses will add to the persuasiveness of your witness examinations. So go ahead and make Clint’s day: Listen. 

Endnotes

1. Horace Rumpole in *Rumpole and the Honourable Member*, by John Mortimer.

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